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James D. Velke

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EXAMINER

FABIAN-KOVACS, ARPAD

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* JAMES D. VELKE and WILLIAM R. WRIGHT  
Appeal 2009-002967  
Application 10/712,261  
Technology Center 3600

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Decided:<sup>1</sup> July 21, 2009

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*Before* WILLIAM F. PATE, III, JENNIFER D. BAHR, and  
LINDA E. HORNER, *Administrative Patent Judges*.

HORNER, *Administrative Patent Judge*.

DECISION ON APPEAL

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<sup>1</sup> The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

## STATEMENT OF THE CASE

James D. Velke et al. (Appellants) seek our review under 35 U.S.C. § 134 of the Examiner's decision rejecting claims 27-30. Claims 1-26 have been cancelled. We have jurisdiction under 35 U.S.C. § 6(b) (2002). We REVERSE.

The Appellants' claimed invention is a latch assembly for a walk-behind mower for receiving a folded-up sulky for storage during transport. Spec. 1, para. 0001.

The Appellants seek review of the Examiner's rejection of claims 27-30 under 35 U.S.C. § 103(a) as unpatentable over: U.S. Patent No. 5,810,371 to Velke (issued Sep. 22, 1998), and U.S. Patent No. 6,622,354 B1 to Klingier (issued Sep. 23, 2003) and/or U.S. Patent No. 5,878,834 to Brainerd (issued Mar. 9, 1999) and/or U.S. Patent No. 5,966,911 to Gray (issued Oct. 19, 1999) and/or U.S. Patent No. 4,156,339 to Dunn (issued May 29, 1979).

The Examiner's conclusion of obviousness is based on the underlying finding of fact that Velke discloses a latch assembly for coupling a protruding member (65) of the sulky to a spring-biased latch (63) in which the protruding member has a distal end that defines an angle  $\theta$  of from about 30 to 70 degrees with the vertical pivot axis of the sulky. Ans. 3-4. The Appellants contend that Velke does not disclose a protruding member having a distal end extending at the claimed angle  $\theta$ . App. Br. 11-12.

The issue before us is:

Have the Appellants demonstrated the Examiner erred in concluding that claims 27-30 are unpatentable over Velke, and either Klingier, Brainerd, Gray, or Dunn, because the Examiner's underlying factual finding that

Velke discloses a protruding member, with at least a distal end that defines an angle of from about 30 to 70 degrees with the vertical pivot axis of the sulky, is incorrect?

Claim 27 contains the limitation “wherein the protruding member extends outwardly from a body of the sulky so that at least a distal end of the protruding member defines an angle  $\theta$  of from about 30 to 70 degrees with the vertical pivot axis of the sulky.” The Appellants’ Specification describes the protruding member 87 extending away from the axis 79 (the vertical pivot between the platform and arm 75 that connects the sulky to the mower) in a plane 90 (plane 90 is perpendicular to the side plan view of the sulky). Spec. 7-8, para. 0033; Spec. 9, para. 0037; Fig. 4. The Specification then defines the angle  $\theta$  as measured from plane 90 (the plane defined by protruding member 87 as it extends away from the sulky) to the vertical pivot axis (axis 79). Spec. 9, para. 0037; Fig. 4. We interpret claim 27 in light of the description provided in the Appellants’ Specification to require that at least the distal end of the protruding member extend outwardly from the body of the sulky at an angle  $\theta$  of about 30 to 70 degrees, as measured by the angle between the plane defined by the outwardly extending distal end of the protruding member as it extends away from the sulky and the vertical pivot axis.

Velke discloses a sulky device for a self-propelled mower that enables improved performance and storage. Velke, col. 1, ll. 6-11. Velke discloses that the pivot 11 is the vertical pivot axis between the platform 21 and the elongated arm 9 that connects the platform to the rear of mower 5. Velke, col. 4, ll. 11-16; Fig. 1. Pivot 11 is comprised of outer tube 41 that houses the vertical shaft portion 39 of L-shaped arm 12. Velke, col. 4, ll. 16-24;

Fig. 1. The horizontal shaft portion 45 of L-shaped arm 12 is housed in tube 47, attached to platform 21, to form horizontal pivot 13. Velke, col. 4, ll. 19-24; Fig. 1. Ring 65 is located on shaft 39 and extends outwardly from shaft 39 in a plane parallel to the side plan view of the sulky. Velke, col. 6, ll. 14-16; col. 7, ll. 24-25; Fig. 3.

The claim requires an angle  $\theta$  of about 30 to 70 degrees, as measured from the plane defined by the protruding member as it extends away from the sulky to the vertical pivot axis. The plane defined by the protruding member (ring 65) of Velke is parallel to the side plan view of the sulky, so that the vertical pivot axis lies within that plane, and for that reason there is no angle between the plane and the vertical axis.

The angle drawn and measured by the Examiner is not measured from the plane defined by the distal end of the protruding member as it extends outwardly from the sulky as required by the claim. *See* Ans. 9.<sup>2</sup> Rather, the Examiner drew a line tangential to a point on a distal portion of the ring, such that this line and the vertical pivot axis intersect at an angle within the claimed range. A line tangential to a point on the ring does not, however, represent the angle formed by the distal end of the ring itself as it extends outwardly from the sulky. In other words, a tangent to a structure that defines an angle is not the structure itself (or a portion thereof) defining that angle.

The Appellants have shown the Examiner erred in concluding the subject matter of claim 27 would have been obvious in view of Velke, and

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<sup>2</sup> The figure reproduced by the Examiner in this portion of the Answer appears to be Figure 11 of Velke, though it is not identified. *See* Ans. 9, and Velke, Fig. 11.

either Klingier, Brainerd, Gray, or Dunn, because the Examiner erred in the underlying finding that Velke discloses a protruding member with at least a distal end that defines an angle of from about 30 to 70 degrees with the vertical pivot axis of the sulky. As such, the Appellants have shown the Examiner erred in rejecting claim 27 under 35 U.S.C. § 103(a) as unpatentable over Velke. Further, the rejection of dependent claims 28-30 is also in error by virtue of their dependence from claim 27.

We reverse the Examiner's decision to reject claims 27-30.

REVERSED

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